

MEMORANDUM

TO: Commissioners

FROM: William D. Chan, Health Policy Analyst
Health Resources Division

DATE: December 20, 2001

RE: **Action Item #13:** An Analysis and Evaluation of Certificate of Need Regulation in Maryland: Working Paper—Intermediate Care Facilities for Mental Retardation (ICF/MR) Services
Staff Recommendation—Release for Public Comment

Introduction

The Maryland Health Care Commission's working paper, *An Analysis and Evaluation of Certificate of Need Regulation in Maryland: Intermediate Care Facilities-Mental Retardation (ICF/MR) Services*, was developed as one in a series of working papers examining major policy issues of the Certificate of Need (CON) process as required by House Bill 995 (1999). The paper was intended to provide a basis for public comment on a series of potential alternative regulatory and related activities, and presented two options for the Commission's future regulation of these services:

- Option 1: Maintain Existing Certificate of Need Program Regulation.
- Option 2: Deregulation from Certificate of Need Review, with Approval by the Developmental Disabilities Administration of Any New Facilities.

The working paper was released for public comment on October 18, 2001, with written comments from interested organizations and individuals requested by November 19, 2001. The Commission received two letters commenting on the paper and the regulatory options; these letters are attached to this document, and the comments summarized in this report. Based on the information provided in the Working Paper and

from the public comment, Staff proposes a recommendation for the Commission to present to the General Assembly.

Summary of Public Comment

The first comment on the Working Paper was from the Howard County Board of Health. Ann Mech, R.N., J.D., and Chairperson for the Howard County Board of Health informed the Commission that her Board supports Option 1: Maintaining Existing Certificate of Need Program Regulation. This letter of recommendation is attached to this document.

The second response was from Diane K. Coughlin, Director of the Developmental Disabilities Administration (DDA) in the Department of Health and Mental Hygiene, which operates the only four ICFs providing an intermediate level of care in the State. DDA notes its appreciation of the paper and the two options it offered for the Commission to consider – basically, continue to regulate this service through CON, or remove the CON requirement, and defer all decision regarding market entry and exit to DDA. However, DDA proposes a third option for the Commission’s consideration: that CON review continue for any potential new ICF serving the developmentally disabled population, but deregulate any reduction of bed or facility capacity from CON review, “with approval by the Developmental Disabilities Administration.”

In addition to this recommendation, Ms. Coughlin and her staff forwarded corrections and editorial changes to Staff’s Working Paper as it was issued in October 2001.¹ An example of the factual corrections DDA staff submitted, involves the Working Paper’s characterization of per diems at the DDA residential centers, which DDA staff thought sounded too high; however, this is information obtained from the DHMH Division of Reimbursements, and its Health Services Analysis and Evaluation Administration.² Many of the editorial changes suggested are semantic in nature, or take issue with certain characterizations. None of the editorial comments provided to Staff with Ms. Coughlin’s recommendation affect the central issue of the Working Paper, the question of whether to propose that the Commission recommend changing CON coverage of intermediate care facilities serving the developmentally disabled in Maryland.

Staff Response and Recommended Action

Based on the research and analysis undertaken in the preparation of the Working Paper, and on the public comment received on this document from the Howard County Board of Health and the DDA, Staff proposes that the Commission recommend to the General Assembly that the State of Maryland maintain existing Certificate of Need

¹ Although Ms. Coughlin and her staff did not receive a preliminary draft of the Working Paper, Staff contacted them numerous times during its preparation, requesting information on the licensed bed totals of the four State residential centers, confirmation of data, and other administrative and program details.

² *An Analysis and Evaluation of Certificate of Need Regulation in Maryland: Intermediate Care Facilities-Mental Retardation*, p. 14.

coverage of beds and facilities licensed as ICF-MR. Under current law, a CON is needed to establish a new facility that provides intermediate care to persons with developmental disabilities or mental retardation, to increase the number of ICF/MR beds in an existing State Residential Center (“SRC”), and to close any of the SRCs, or decrease bed capacity beyond a regulatory threshold. Removing the requirement for CON review of proposed closures or downsizings, and giving that authority to DDA, would require a statutory change.

The Developmental Disabilities Administration (“DDA”) operates the four publicly funded State Residential Centers treating the residents of the State of Maryland: there are no privately operated facilities that treat developmentally disabled individuals in residential facilities in Maryland. DDA has been solely responsible for planning and identifying the number of ICF/MR beds that will remain in operation within the four SRCs, in the context of the legal, social, and clinical movement to move people out of residential facilities and into community-based programs – and in the context of the State budget.

Although the trends illustrated by tables in the Working Paper have been steadily downward, in bed capacity, average daily census, and overall occupancy, retaining CON review of proposed new ICF-MR bed capacity or facilities serves two important purposes. First, should circumstances ever create a situation in which private or proprietary providers attempt to enter this area, the impact of this change – on DDA’s facilities, on the State budget, and on continued progress toward obtaining for each person the appropriate level and setting of care -- will be the focus of any CON review. The responsibility and the interest of the public system would be a key consideration.

In addition, keeping CON review of both proposals to increase capacity, and to decrease bed capacity or close residential facilities – even in the current circumstance of a State-only “marketplace” – brings the review of an independent agency to bear on the proposed closure or downsizing. This scrutiny and consideration provides, as it has historically in CON exemption reviews of proposed hospital closures, another perspective on the impact of the action, which can either confirm its advisability, or raise questions that DDA could not. Procedurally, the Commission (and its predecessor Health Resources Planning Commission) have worked closely with the Developmental Disabilities Administration to review proposed downsizings and facility closures expeditiously, as the Working Paper observed.

That being said, Staff believes that accommodations for DDA’s unique position in the provision of intermediate care to the developmentally disabled and mentally retarded should be considered, and could be accomplished through the development of a State Health Plan section to guide reviews of CON applications for ICF-MR beds and facilities. In much the same way that the Commission’s recently-updated State Health Plan for Intermediate Care Facilities providing substance abuse treatment distinguish between publicly-funded (“Track I”) and privately-operated substance abuse treatment (“Track II”) programs – and give the Track I projects and facilities significant procedural advantages, a Plan section for ICF-MR reviews could set forth different standards and

procedural rules for proposals by DDA to close beds or residential centers. At the same time, criteria and considerations for any proposed private or proprietary ICF could specifically target that CON review on the impact of additional ICF-MR capacity on both DDA's programs and the State budget.

In summary, Staff does not propose at this juncture that the Commission recommend changing the regulation of intermediate care facilities for the developmentally disabled and mentally retarded by Certificate of Need. However, Staff does recommend that the Commission, in consultation with the Developmental Disabilities Administration, work to include Certificate of Need review standards and procedures in the State Health Plan that will recognize the unique responsibilities and circumstances of DDA in providing this service.